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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 223

FAIRVIEW PUBLIC UTILITY DISTRICT, NUMBER ONE, WILLIAM E. MOORE, FERN WILLIAMS, GLENN H. EAGON, AL OTTER, PAULINE TRUEX, *Appellants*,

vs.

CITY OF ANCHORAGE, A MUNICIPAL CORPORATION, *Appellee*

LAWRENCE HAWK, ET AL., *Appellants*,

vs.

FAIRVIEW PUBLIC UTILITY DISTRICT, NUMBER ONE, ET AL, AND THE CITY OF ANCHORAGE, A MUNICIPAL CORPORATION, *Appellee*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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Appellants, pursuant to Rule 16, Section 3 of the Revised Rules of this Court, hereby present their brief in opposition to the Motion to Dismiss or Affirm heretofore filed by Appellee for the following basic reasons:

A. The Motion is not filed in conformance with Rule 16, Paragraph 1 of the Revised Rules of the Supreme Court.

Proof of service shows June 25, 1962 as the date the jurisdictional statement in its typewritten form as required by the Rules of this Court was served on Appellee's Counsel. More than thirty days elapsed before the service of the undated Motion which on its face was mailed on August 8, 1962.

B. The questions presented by the Motion and Answers thereto present no foundation for Dismissal or Affirmance.

C. A map or diagram is attached to said Motion which is highly improper in view of the fact that it would amount to evidence and was at no time presented in the lower Courts. Said map is grossly inaccurate as will be shown later.

Questions Presented by Appellee

1. Whether federal questions which are not raised in the pleadings in the trial court but are mentioned in unspecific broad terms in briefs in the Supreme Court of Alaska can be a basis for review jurisdiction in this Court?

2. Whether, in light of the fact that the Appellants failed to raise any federal questions in the trial court and the arguments raised in the State Supreme Court concerning the right to vote and due process were not ruled upon by the State Supreme Court, the Appellants can now, for the first time, come forward with questions of equal protection and privileges and immunities?

3. Whether annexation of territory to the City of Anchorage by state legislative act deprives residents of the annexed territory of a federally guaranteed right to vote on that annexation?

Generally speaking, the questions as presented by Appellee do not cover the fine points of the case before us. It is not clear whether Appellee is claiming that a constitutional question must be raised in original pleadings in trial courts for this Court to review. Just what is meant

by "unspecific broad terms", is likewise uncertain, as will be discussed later in the Argument. Regarding the second question, raised by Appellee, there is a misstatement of fact, since the Argument raised in the State Supreme Court concerning the right to vote and due process were in fact ruled upon by the Alaska State Supreme Court as pointed out in the jurisdictional statement of Appellants and discussed more in detail in the Argument which follows. As far as equal protection and privileges and immunities are concerned, once the Fourteenth Amendment is raised, all of its provisions are before the Court. The third question states only a part of the true issues here involved inasmuch as we are not faced with a bare question of annexation by a State legislative Act without the right of the residents of that area to vote, but with a given right to vote for just such annexation which was denied some residents and given to some residents.

Statement of the Case

Fundamentally Appellee properly stated the case with certain glaring exceptions as set out below.

The second paragraph of the Statement of the Case, appearing on Page Two of the Motion to Dismiss, admits the inequalities of the law. It should have stated however, that neither the Acts set a standard as to when one method will be used and when the other will be used.

Paragraph 3, Page 3 of the Motion to Dismiss is in error as the map above referred to and improperly included by Appellee is erroneous. Only one section is the Fairview Public Utility District Number One, another section therein called Fairview is Government Hill, and the Third section is Turnagain. Neither of these had a Public Utility District within it.

This erroneous, self-serving, unrealistic drawing omits also to include the Spenard Public Utility District, by pur-

portedly calling it Anchorage. This was the area which was permitted to remain independent by the petition-election method.

The most glaring error in the Statement of the Case is that no Federal questions were raised, since no more serious Federal question can be raised than the right to vote and the right to equal protection of the law and the right to due process of the law. These questions were all raised by the Appellants and were passed upon by the Alaska Supreme Court, as shown by the jurisdictional statement at Pages 25, 26 and 27. These matters were discussed in the Supreme Court Opinion in the Appendix of the jurisdictional statement, at Pages 38, 39 and 40.

It is to be noted that no evidence was heard at any time in this case, so Appellee's use of "facts presented" is generally erroneous.

Argument

The statute creating the Boundary Commission and its Constitutionality is discussed at length throughout the Supreme Court Opinion appearing in the Appendix to the Jurisdictional Statement. Particularly does the Court say at Page 39 that the two methods of annexation, one by petition election and the other by the Boundary Commission were justified.

The contention of Appellee that the federal question was not timely raised cannot be seriously asserted in view of the Fourteenth and Fifteenth Amendments admittedly raised by the Court's discussion of these in its decision and the general admission of the matters raised by these Amendments throughout the briefs of the parties on both sides of the controversy. It is interesting to note that the cases cited by the Appellee have no similarity whatsoever to the case before us. It is elementary law that

the equal protection of the laws would include the right to vote, that due process of law would include a preservation of freedom, which has inherent therein the right to vote and that the equal protection of the laws "includes the protection of equal laws."

Appellee would rely on *White River Lumber Co. v. Arkansas Ex Rel.* 279 US 692, 699, 700. That case stands for the proposition that a constitutional question which does not appear by the record to have been presented to, or have been passed upon by a State Supreme Court but which is raised for the first time by the assignment of errors in this Court, cannot be considered here. It is submitted that not many pages of the Opinion in this case will be lacking in reference to either the particular Statute involved or to Constitutional Amendments under which the Appeal was sought in the Alaska Supreme Court. The Brief of the Appellee at Page 9, in the Alaska Supreme Court contains the following, ". . . relates only to alleged violations of the Fourteenth and Fifteenth Amendments to the Constitution of the United States . . .". This belies contention of Appellee's counsel that these questions are being raised for the first time in the United States Supreme Court. His contention of no federal question being raised in the Superior Court is not borne out by any cases requiring same. Even if same had been required and it is submitted that there is no such requirement, the fact that the Alaska State Supreme Court did consider and pass on same would place same properly before this Court for review on Appeal.

Although Rule 23 pertains to Certiorari, the principle is generally the same pertaining to Appeal and that provision states: ". . . the statement of a question presented will be deemed to include every subsidiary fairly comprised therein . . .". The Fourteenth Amendment

was before the Court. This meant privileges and immunities clause as well as all of its other provisions.

The next case mentioned by the Appellees is *CIO* v. *McAdorg*, 325 US 472, 477. In that case, at Page 477, we find the following language: ". . . that Court did not pass on that question either in its Opinion in this case or in its Opinion in the Alabama State Federation of Labor case which it adopted as controlling . . . since the State Court did not pass on the question now urged and since it does not appear to have been properly presented to the Court for decision, we are without jurisdiction to consider it in its first instance here . . ."

There is no similarity whatsoever to the situation in our case, since the Alaska Supreme Court definitely considered and passed on all matters now urged.

Edelman v. *California*, 344 US 357 is next urged as substantiating the position of Appellee. That case bears no similarity to the case at bar. The Constitutional question had been presented for the first time on Appeal to the California Superior Court, but had not been passed on since the Appeal was dismissed because of certain peculiarities of California procedure. However, the vigorous dissent of Justice Black with whom Justice Douglas concurred held that the question still should have been passed on.

In the dissenting Opinion of Chief Justice Earl Warren in *Communist Party of the United States of America, Petitioner* v. *Subversive Activities Control Board*, 367 US 1, we find the following at Page 119. ". . . In fact the U.S. Reports are replete with instances wherein the Court decided issues which were never even mentioned in the petition for certiorari. See *E. G. Boynton* v. *Virginia*, 364 US 454: *Mackey* v. *Mendoza-Martinez*, 362 US 384: *Neese* v. *Southern R. Co.*, 350 US 77: *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, 329 US 129: *Marshall* v. *Pletz*: 317 US 383:

Erie R. Co. v. *Tompkins*, 304 US 64, and at Page 120 we find the following: " . . . And in *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, *supra*, the Court avoided a difficult constitutional adjudication by resting its decision on a non-constitutional ground which, as the Court noted, "was neither considered nor decided by the Court below, nor argued here." Id. at 132. Only last Term, in *Mackey* v. *Mendoza-Martinez*, *supra*, the Court, in an effort to avoid an unnecessary constitutional decision, remanded the case to the District Court for consideration by that Court of a non-constitutional issue which had not been raised by either party in any Court, but which this Court, *sua sponte*, had discovered lurking in the record . . ."

These are all of the cases cited by Appellee which deal with the presentation of the federal question. The others, such as *Hunter* v. *City of Pittsburgh*, 207 US 161, *Kelly* v. *City of Pittsburgh*, 104 US 78 and *Mt. Pleasant* v. *Beckwith*, 100 US 514, deal generally with annexation under circumstances and statutes having no similarity to the ones before us. It is generally submitted that here we have an unprecedented situation allowing arbitrary annexation by which you take your choice in getting the area. If, by petition and election, they do not choose to come in, then the Boundary Commission acts to force them in. The residents of the area are more like puppets. If they exercise their free choice and the City is not pleased, then the Boundary Commission exercises its choice. If the residents of a particular area are extremely powerful, as obviously the Spenard area residents were, then they may be allowed to remain free. If they are not powerful, as obviously the residents of Fairview were not, they become enslaved to the City. What certainly does a resident have? How long will he be a resident of a particular area? To what extent can he make plans for the future? What method will be

used to annex him if he is to be annexed? Will he have a chance to vote or will he not? These are vital questions touching the very heart of American life and freedom, similar to those of taxation without representation antedating the Revolutionary War.

On whether or not the questions presented are substantial we ask ourselves the question:

1. Who is to judge which of the two methods will be used?

This Court has consistently held that the equal protection of the laws means the protection of equal laws. Appellee seems to think a State can do anything and that a Municipal Corporation can do anything. This would completely ignore about twenty years of this Court's decisions which have dealt with segregation. An inequality is an inequality whether or not it pertains to race.

However, the contention that this is a State political question would place politics above Constitutional rights. The contention of all persons "similarly situated having been treated equally" has no basis since dual systems of annexation are admitted without discretion who knows where as to which will be used at a given time. Serious violation of Constitutional rights have occurred and in view of the fact that Alaska is a new State where this type of evil should be corrected early to avoid future confusion, the Question becomes extremely substantial.

Conclusion

We have no "redistricting" here as contended by Appellee but an annexation of a quasi-municipal Corporation by a municipal Corporation. Two separate laws for arbitrary application to citizens of a State as admitted by Appellee were available. The citizens were powerless to decide or to know which law would be available to them. The

law which takes away the right to vote is unconstitutional and a general procedure based on a dual system is unconstitutional. Vital constitutional rights are involved and this Court should decide this constitutional question which was timely presented. Alaska, being a new State, the largest of our 50 States with the potential for having the largest number of cities and the largest public utility districts in the nation, presents a more vital problem in this respect than any other State possibly could.

Dated at Anchorage, Alaska this 23rd day of August, 1962.

Respectfully submitted,

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